IN THE SUPERIOR COURT OF PENNSYLVANIA

SITTING IN PITTSBURGH

1787 WDA 2011

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

TERRENCE FOWLER (AKA TERRANCE FOWLER)
Appellant

BRIEF FOR APPELLANT

Appeal from the Judgment of Sentence imposed by the Erie County Court of Common Pleas, Criminal Division, entered on September 20, 2011 at Trial Court Docket No. 2536 OF 2010.

Respectfully submitted,

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COPY

Date: February 24, 2012

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Terrence Fowler argues that his convictions for Attempted Homicide, Aggravated Assault and related charges were against the weight of the evidence because the victim did not identify him, the eyewitness identification of the alleged co-conspirator was flawed and tainted by seeing Fowler during a prior proceedings, no tangible evidence linked Fowler to the robbery, Fowler's father testified that Fowler was home when the robbery occurred and a character witness testified to Fowler's reputation for non-violence.

Terrence Fowler argues that the sentence of 240 to 480 months for Attempted Homicide should have been modified because it reaches the statutory limit, the minimum sentence is indistinguishable from an aggravated range sentence, the court failed to consider various mitigating factors when fashioning the sentence, and the sentence for Attempted Homicide should have merged into the sentence for Aggravated Assault instead of the opposite.

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I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from the Order of the Court of Common Pleas of Erie County, Pennsylvania imposing sentence, in a matter not within the exclusive appellate jurisdiction of the Commonwealth or Supreme Court, is established by 42 Pa.C.S. §742.

I(b). SCOPE AND STANDARD OF REVIEW

An appellate court's scope of review from the discretionary aspects of a sentence is limited to challenges which present a substantial question. **Commonwealth v. Whitmore,** 912 A.2d 827, 830 (Pa. 2006).

An appellate court's standard of review from the discretionary aspects of a sentence is a review of whether the sentence is the product of a manifest abuse of discretion. A trial court will have abused its' discretion when the record reflects that its' judgment was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will. **Commonwealth v. Paul,** 925 A.2d 825 (Pa. Super. Ct. 2007).

A claim that time credit was denied challenges the legality of a sentence. If a sentence is illegal, then it is subject to correction and the sentence must be vacated. An appellate court's standard of review is plenary and is limited to determining whether the trial court committed an error of law. **Commonwealth v. Morris,** 958 A.2d 569 (Pa. Super. Ct. 2008).

Appellate review of a challenge to the weight of the evidence is limited to whether the trial court abused its discretion. Although an appellate court cannot substitute its judgment for the finder of fact, it may reverse if the findings were so contrary to the evidence as to shock one's sense of justice. **Commonwealth v. Jarowecki,** 923 A.2d 425, 433 (Pa. Super. Ct. 2007).

II. FINAL ORDER OF THE COURT BELOW

A true and correct copy of the sentencing order immediately follows.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
)
v)
)
Terrance Lee Fowler,)
Defendant) NO. CR 2536 of 2010

Sentencing Order

AND NOW, this 20th day of September 2011 following conviction, it is hereby **ORDERED, ADJUDGED and DECREED** that the defendant is sentenced as follows:

Count 1: Criminal Attempt (Homicide) 18 Pa.C.S. 901

Incarceration for a minimum period of 240 months and a maximum period of 480 months at the PA Department of Corrections with 40 days credit for time served. The defendant is to pay costs and $621,181.10 restitution.

Count 2: Aggravated Assault 18 Pa.C.S. 2702 a - Merges with Count 1

Count 4: Criminal Conspiracy (Robbery) 18 Pa.C.S. 3701 a1i

Incarceration for a minimum period of 84 months and a maximum period of 168 months at the PA Department of Corrections concurrent to Count 5 below. The defendant is to pay costs.

Count 5: Robbery 18 Pa.C.S. 3701 a1i

Incarceration for a minimum period of 90 months and a maximum period of 180 months at the PA Department of Corrections consecutive to Count 1 above. The defendant is to pay costs.

Count 6: Possess Instruments of Crime 18 Pa.C.S.907 a

Incarceration for a minimum period of 10 months and a maximum period of 60 months at the PA Department of Corrections concurrent to Count 5 above. The defendant is to pay costs.

Conditions of Supervision: The defendant shall pay supervision fees/administrative fees/costs/fines/restitution per month on a payment plan and comply with all rules and conditions of **probation, parole or intermediate punishment** as set forth in any contract of supervision and any other conditions as the court may impose.

BY THE COURT,

Shad Connelly, Judge

III. STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

The sentencing court deemed the sentence appropriate and the verdict not against the weight of the evidence.

Whether the convictions were against the weight of the evidence because the victim did not identify Appellant, the eyewitness identification of the alleged co-conspirator was flawed and tainted by seeing Appellant at prior proceedings, no tangible evidence linked Appellant to the robbery, Appellant's father testified that Appellant was home when the robbery occurred and a character witness testified to Appellant's reputation for non-violence?

Whether the sentence of 240 to 480 months for Attempted Homicide should have been modified because it is a statutory limit, the minimum sentence is indistinguishable from an aggravated range sentence, the court failed to consider various mitigating factors when fashioning the sentence, and the sentence for Attempted Homicide should have merged into the sentence for Aggravated Assault instead of the opposite?

IV. STATEMENT OF FACTS AND PROCEEDINGS BELOW

On July 14, 2011 and while represented by Attorney David Ridge, Appellant Terrence Fowler was tried before a jury on charges of Attempted Homicide, Aggravated Assault, Recklessly Endangering Another Person, Conspiracy to Robbery, Robbery and Possessing Instruments of Crime. The charges were the result of allegations that Fowler and co-defendant Damon Rausaan Dixon robbed Rob Cher Jewelers on July 7, 2010.

During Fowler's trial, victim Aleksandr Cheremnykh ("Aleks") told the jury that he owns the jewelry store located at 4520 Peach Street in the City of Erie. **Notes of Testimony,** July 14, 2011, (hereinafter "N.T.1") at p. 24. Aleks told the jury that he was working on July 7, 2010 at noon when he observed two robbers enter his store. N.T.1 26. Aleks testified that the first robber wore a dark blue t-shirt, a dark cap, sunglasses and a mask and held Aleks at gunpoint with a semiautomatic handgun. N.T.1 26, 27. The assailant pointed the gun at Aleks and ordered him to open the safe. N.T.1 28. Aleks testified that the second robber was wearing a white shirt and, like the first robber, covered his head with a ball cap, mask, and dark sunglasses. N.T.1 29.

Aleks told the jury that he refused to open the safe and told the robbers "they can have in the cash register money if they want money..." N.T.1 30. In response, the robbers exchanged guns and Aleks noticed that the second gun was a revolver. N.T.1 30. The robber with the dark shirt then fired the weapon, the bullet striking Aleks in the middle of the chest. N.T.1 31.

Aleks was treated at UPMC Pittsburgh for a month and a half and is still suffering from injuries as a result of the shooting. N.T.1 33.

Aleks told the jury that the robbers took several old currency silver certificates and keys on a large key ring. N.T.1 35, 46. Aleks testified that the robbers ran north up Peach Street and then parallel to Peach. N.T.1 36. During cross-examination, Aleks conceded that he never observed the robbers' faces. N.T.1 47.

The prosecution also called Bruce Wagner, a resident of Erie who lived a quarter mile from the jewelry store, to testify on behalf of the prosecution. N.T.1 50, 52. Wagner testified that on the day of the robbery, he flagged down a patrol car after learning of the robbery over his scanner. N.T.1 53. Wagner told the jury that at 11:00 am on the day of the robbery, he was in his living room and observed from his window a small green four-door vehicle drive down his street and park. The vehicle had two occupants who sat there a few minutes before getting out of the car and walking south on Elmwood onto Harding. N.T.1 54. Wagner told the jury that the driver was dressed in dark colored clothing and the passenger wore a dark cap and a white pullover shirt, dark shorts and dark shoes. N.T.1 55.

Approximately 10 minutes later, Wagner observed the same two individuals walking back to the vehicle, sitting in the vehicle for a few minutes and then driving away north. N.T.1 55.

Less than five minutes later, Wagner observed the same vehicle return and park in almost the same spot. N.T.1 56. Wagner told the jury that he observed the driver pull his t-shirt or something up over his nose a couple times and look directly into Wagner's home and the home south of Wagner's. N.T.1 56. Both individuals then got out of the car and walked south on Elmwood onto Harding and out of his sight. Wagner further testified:

> I turned on my scanner and I heard that the jewelry shop around the corner from me was robbed and I was about to call 911 when I observed the police car going down the street and I ran out and flagged him down.

. . .

> Approximately ten minutes, fifteen minutes after they were out of my sight, they came running back down Elmwood. Driver got in the car, had to wait a couple seconds for the passenger to catch up, and then he left.

N.T.1 58.

Wagner testified that Appellant Terrence Fowler was the individual who got back into the vehicle to drive the car and he knew that "because he looked right at me before he got out of the car the second time." N.T.1 59. Wagner further told the jury that when the occupants of the vehicle left the vehicle for ten minutes, Wagner "ran out and wrote down the license plate number of the car." N.T.1 59.

Wagner described Fowler as having worn all dark clothing and described him to police as 6'2" and 200 lbs. N.T.1 60. Further, Wagner told the jury that the license plate of the vehicle was EZH 7965. Wagner conceded that he did not observe the occupants of the vehicle carrying firearms although he stated that he did observe that both occupants were black men. N.T.1 62, 65.

During cross-examination by Attorney Ridge, Wagner admitted that although asked to identify an occupant of the vehicle through a photo-lineup, he refused the police request because he was not wearing his eye glasses when officers approached him to view the photographs. N.T.1 79. Further, Wagner also conceded that he watched a news story that stated that Terrence Fowler was one of the individuals arrested for the robbery. N.T.1 79. Wagner further conceded that he observed Fowler a couple times at the preliminary hearing stage of the case because continuances were requested. N.T.1 80. Most troubling, Wagner testified that he had previously stated that he was as sure about the identification of the second suspect as he was about the identification of Fowler but admitted that he identified someone other than the co-defendant as the second suspect. N.T.1 84.

Erie Police Officer Salvador Velez testified that on the day of the robbery, Wagner flagged him down, gave him the information including the license plate number and described both the green car and the occupants. N.T.1 94. Officer Velez then walked over to where the car was parked and found a five-dollar silver certificate. N.T.1 96.

Officer Don Sornberger also testified for the prosecution. Officer Sornberger testified that he responded to the jewelry store robbery and was subsequently given a description of the vehicle used. N.T.1 104. As he pulled up to the residence associated with the vehicle at approximately 30 minutes after he initially responded to the robbery, he observed a small compact greenish-blue vehicle up on a jack with an open trunk. N.T.1 104, 107. With the vehicle officers found Appellant Terrence Fowler and an individual who the officer described as Fowler's "uncle," later identified as his father. N.T.1 104. Another patrolman who also responded, Officer Pilarski, took Fowler into custody. N.T.1 105. Although no firearms were recovered from Appellant Fowler, officers recovered a .357 revolver from the right front pants pocket of Fowler's father. N.T.1 106. The registration of the vehicle matched the registration that officers were looking for. N.T.1 112. Both individuals were taken into custody. N.T.1 106.

Fowler subsequently gave a statement to police. On cross-examination, Detective James Spagel conceded that despite having been arrested shortly after the robbery, the affiant observed no blood on Fowler. N.T.1 129. The affiant further conceded that he did not performe a spectrum analysis test that would have shown whether a person discharged a firearm through residue. N.T.1 130.

Detective Mark Sennett testified that he helped search Fowler's home on July 7, 2010. Sennett told the jury that he located a nylon holster containing a handgun magazine. **Notes of Testimony,** July 15, 2011, (hereinafter "N.T.2") at p. 4. Sennett also testified that five vinyl style gloves were found in the bottom of a garbage can outside the residence. N.T. 2 at 9. Further, Sennett conceded on cross-examination that Fowler's father, James Fowler, also lived in the residence. N.T.2 at 10. Sennett testified that the weapon removed from James Fowler's person was a silver metal .327 federal magnum with dust and lint inside of it indicating that it had not been recently fired. N.T.2 at 11.

Detective Adam DiGilarmo testified that he searched a bedroom and found a Mossberg shotgun between the mattress and box spring and an empty "pancake holster" underneath the bed with a silver magazine underneath. N.T.2 at 16. DiGilarmo unloaded the weapon that contained two live shells but conceded that there was no evidence it had been fired. N.T.2 at 16, 28. Detective DiGilarmo further told the jury that he recovered a black baseball cap from the vehicle that had been lodged between the front passenger and rear passenger seat. N.T.2 at 21. DiGilarmo also found a second white T-shirt in the vehicle but conceded that the shirt was a child's size. N.T. at 22, 24.

The prosecution also presented Fowler's statement given to police on the day of the robbery.

Appellant's father, James Fowler, testified on behalf of the defendant. James told the jury that in July of 2010, he was living in his home at 1206 East 21st Street and with him lived his son Terrence (Appellant), Terrence's girlfriend, Tashara Hancock and his grandson and granddaughter. N.T.2 at 34.

James testified that on the date of the robbery, he remembers Terrence stating earlier in the day that it was his intention to install brakes on his vehicle. N.T.2 at 37. Terrence drove Tashara to work and drove their daughter to day care before returning to his father's home. N.T.2 at 38. Although James could not recall the exact time Terrence returned, he remembers that it "might have been not quite an hour" from the time that he left. N.T.2 at 40. James testified that there was nothing unusual about the way Terrence was dressed when he returned and he had the same clothes on that he wore when he left and did not have a gun or a holster. N.T.2 at 41, 44. James also told the jury that he had latex gloves in his home because of a medical condition. N.T.2 at 45.

Katie Peterson also testified for the defense. On the day of the robbery, Ms. Peterson was an employee of the Glenwood Park YMCA. N.T.2 59. Peterson stated that on July 7, 2010, Fowler dropped his daughter off at day care between 9:30 am and 9:45 am. N.T.2 at 60. Peterson also testified that Fowler was driving a green vehicle on the day he dropped his child off at day care. N.T.2 at 61.

A final witness by the prosecution testified that Fowler is a "peaceful, quiet and loving, good family guy." N.T.2 at 63.

After deliberation, the jury found Fowler guilty of Attempted Homicide, Aggravated Assault, Conspiracy to Robbery, Robbery and Possessing Instruments of a Crime.

On September 13, 2011, Attorney Ridge filed a Post-Trial Motion challenging the weight of the evidence and the sufficiency of the evidence to support the convictions. The motion was denied by the trial court.

On September 20, 2011, Fowler was sentenced by the Honorable Shad Connelly who provided a detailed explanation for Fowler's sentence. Notes of Testimony, Sentencing, September 20, 2011 at pp. 17-21. Fowler was sentenced to the following:

- Attempted Homicide, 240 – 480 months of incarceration
- Robbery, 90 to 180 months incarceration consecutive to the sentence for Attempted Homicide
- Conspiracy to Robbery, 84 to 168 months to be served concurrent with the sentence for Robbery.
- Possess Instr. of Crime, 10 to 60 months to be served concurrent with sentence for Robbery.

The sentence for Aggravated Assault merged into the sentence for Attempted Homicide. On September 28, 2011, Attorney Ridge filed a Post-Sentence Motion seeking a reduction in the sentence and arguing that the court failed to consider mitigating factors. Attorney Ridge also argued that the sentence for Attempted Homicide should have been merged into the sentence for Aggravated Assault instead of the opposite. Specifically, in reference to the merger issue, he argued:

> At the time of sentencing, defense counsel argued to the Court that merger of the Aggravated Assault and Criminal Attempt at Homicide should occur. The defense also provided the Court with case law indicating that the Court had discretion to merge Criminal Attempt/Homicide into Aggravated Assault even though Aggravated Assault was the lesser included offense. E.G., ***Commonwealth v. Everett,*** 705 A.2d 837 (Pa. 1998). In the instant case, the factual circumstances would better justify a sentence for Aggravated Assault with a Criminal Attempt/Homicide being merged into that offense since there is not evidence beyond a reasonable doubt that the shooter actually intended to kill the victim at the time the victim was shot.

On October 10, 2011, Fowler's Post-Sentence Motion was denied.

Attorney Ridge was granted leave to withdraw and Assistant Public Defender Darrel Vandeveld entered an appearance. Attorney Vandeveld filed a Notice of Appeal on November 10, 2011. Judge Connelly entered a Concise Statement Order. In response, Attorney Vandeveld filed a 6-page "concise" statement challenging the weight of the evidence to support the verdict as well as the discretionary aspects of the sentence. Like Attorney Ridge, Attorney Vandeveld also claimed that the sentence for Attempted Homicide should have merged into Aggravated Assault instead of the opposite.

A responsive opinion was filed on December 9, 2011.

Attorney Vandeveld was called to Army active duty and the undersigned entered an appearance as appellate counsel.

V. 2119(f) STATEMENT

Commonwealth v. Goggins, 748 A.2d 721 (Pa. Super. Ct. 2000) requires that the Pa.R.A.P. 2119(f) Statement for purposes of 42 Pa.C.S. § 9781(b) must specify where the sentence falls in relation to the sentencing guidelines, what particular provision of the sentencing code the sentence violates, what fundamental norm the sentence violates, and the manner in which it violates that norm.

The sentence of 240 to 480 months incarceration for Attempted Homicide is a sentence beginning with the standard range of the guidelines but reaching the statutory maximum. With an offense gravity score of 14 and a prior record score of 2, the standard range of the guidelines is 114 to 240 months. There is no sentencing recommendation for the aggravated range.

The sentence of 84 to 168 months for Conspiracy to Robbery is a sentence beginning with the high end of the standard sentence recommendation. With an offense gravity score of 11 and a prior record score of 2, the standard range of the guidelines is 66 to 84 months. The aggravated guideline begins at 96 months.

The sentence of 90 to 180 months for Robbery is a sentence beginning with the standard sentence recommendation. With an offense gravity score of 12 and a prior record score of 2, the standard range of the guidelines is 78 to 96 months. The aggravated guideline begins at 108 months.

The sentence of 10 to 60 months for Possess Instruments of Crime is a sentence beginning with the standard sentence recommendation. With an offense gravity score of 4 and a prior record score of 2, the standard range of the guidelines is RS to 12 months. The aggravated guideline begins at 15 months.

An allegation that a sentencing court failed to consider certain factors does not raise a substantial question. **Commonwealth v. Brown,** 741 A.2d 726, 735 (Pa. Super. Ct. 1999). Such a challenge goes to the weight accorded the evidence and will not be considered by an appellate court absent extraordinary circumstances not present here.

Fowler that the sentencing court violated 42 Pa.C.S.A. § 9721 which sets forth the considerations that should be made prior to fashioning a sentence stating:

> **b) General standards.**--In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation).

42 Pa.C.S.A. § 9721.

Fowler properly preserved his sentencing issues through a timely post-sentence motion.

A claim that a court failed to merge where merger was appropriate does not implicate the discretionary aspects of the sentence. Instead, it is a sentence legality issue.

VI. SUMMARY OF ARGUMENTS

Appellant Terrence Fowler argues that the convictions were against the weight of the evidence for several reasons. First, the victim did not identify him as a perpetrator because the perpetrators wore masks. The eyewitness identification was flawed and tainted because the witness had seen Fowler at a prior proceeding and because the witness admitted to mistaken identification of the co-defendant. Further, no tangible evidence linked Fowler to the robbery. Fowler's father testified that Fowler was home when the robbery occurred. Additionally, a character witness testified to Fowler's reputation for non-violence.

Terrence Fowler also argues that the sentence of 240 to 480 months for Attempted Homicide should have been modified for several reasons. First, the sentence reaches the statutory limit. Next, the minimum sentence is indistinguishable from an aggravated range sentence. Further, the court failed to consider various mitigating factors when fashioning the sentence. Lastly, Terrence Fowler asserts that the sentence for Attempted Homicide should have merged into the sentence for Aggravated Assault instead of the opposite.

VII. ARGUMENT FOR APPELLANT

Terrence Fowler argues that his convictions for Attempted Homicide, Aggravated Assault and related charges were against the weight of the evidence because the victim did not identify him, the eyewitness identification of the alleged co-conspirator was flawed and tainted by seeing Fowler during a prior proceedings, no tangible evidence linked Fowler to the robbery, Fowler's father testified that Fowler was home when the robbery occurred and a character witness testified to Fowler's reputation for non-violence.

Argument:

Terrence Fowler argues that his convictions were against the weight of the evidence. Fowler preserved the issue in his Post-Trial Motion and raised the issue in his Concise Statement arguing:

> (A) The victim did not identify appellant as one of the individuals present at the scene of the crime at the time the victim suffered a gunshot wound;
> (B) A central Commonwealth eyewitness should not have been credited by the jury because the eyewitness's testimony at trial was fundamentally unreliable, in that, among other factors, the eyewitness misindentified [sic] a co-defendant in the case at appellant's preliminary hearing, that the eyewitness identification had been tainted because the eyewitness had seen appellant in a television news story, which showed appellant in handcuffs, being led out of a police station, and because the eyewitness had seen appellant at an earlier preliminary hearing – prior to the eyewitness's identification of appellant at appellant's preliminary hearing and at trial, in the presence of appellant's well-known trial counsel, Attorney Ridge.
> (C) The Commonwealth failed to adduce any evidence at trial that weapons and related items seized at appellant's residence had ever been fired or even handled by appellant;
> (D) The items of clothing used by the Commonwealth in its effort to identify appellant were common articles of clothing, such as T-shirts, a baseball cap, and the like, none of which was distinctive in nature;
> (E) The offenses occurred at approximately 11:40am, July 7, 2010; the defense produced a credible witness, James Fowler, who testified that appellant had been at their common residence for almost one hour before the police arrived at the residence at 12:15 pm to 12:20 pm on July 7, 2010, which would have made it impossible for appellant to have been at the scene of the offenses; the jury erred in failing to accept this testimony;
> (F) The appellant produced credible character evidence of appellant's non-violent nature, which should have been credited by the jury to the extent of creating a reasonable doubt as to appellant's guilt.

Decisional law provides

> The weight given to trial evidence is a choice for the factfinder. If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.
>
> When a trial court denies a weight-of-the-evidence motion, and when an appellant then appeals that ruling to this Court, our review is limited. It is important to understand we do not reach the underlying question of whether the verdict was, in fact, against the weight of the evidence. We do not decide

> how we would have ruled on the motion and then simply replace our own judgment for that of the trial court. Instead, this Court determines whether the trial court abused its discretion in reaching whatever decision it made on the motion, whether or not that decision is the one we might have made in the first instance.
>
> Moreover, when evaluating a trial court's ruling, we keep in mind that an abuse of discretion is not merely an error in judgment. Rather, it involves bias, partiality, prejudice, ill-will, manifest unreasonableness or a misapplication of the law. By contrast, a proper exercise of discretion conforms to the law and is based on the facts of record.

Commonwealth v. West, 937 A.2d 516, 521 (Pa. Super. Ct. 2007) (internal citations omitted).

Santiago argument:

Fowler is accurate when he argues that there was no physical evidence linking him to the robbery and that the eye-witness was mistaken in identifying the second robber. Fowler is further correct that the victim did not identify him, the eyewitness identification of the alleged co-conspirator was flawed and the same eyewitness' identification of Fowler was tainted by seeing Fowler at prior proceedings. Further, Fowler's father testified that Fowler was home when the robbery occurred and a character witness testified to Fowler's reputation for non-violence.

Unfortunately, Fowler's claims fails to address the elephant in the room – the good Samaritan neighbor who thought the two men in the green car were acting suspicious and wrote down the license plate number and the officer's recovery of a silver certificate where the car was parked. The defense failed to provide the jury with any explanation as to why Bruce Wagner, who lives a quarter mile from the jewelry store, would have written down Fowler's license plate number if it were not for the fact that his vehicle was parked near Wagner's home in the neighborhood of the jewelry store.

The jury heard how Wagner had flagged down a patrol car after learning of the robbery over his scanner. Testimony revealed that Wagner observed a small green four-door vehicle drive down his street and park. Two occupants sat inside the vehicle for a few minutes before getting out of the car and walking south on Elmwood onto Harding. Wagner told the jury that the driver was dressed in all dark colored clothing and the passenger wore a dark cap and a white pullover shirt, dark shorts and dark shoes. Approximately 10 minutes later, Wagner observed the same two individuals walking back to the vehicle, sitting in the vehicle for a few minutes and then driving away north. Less than five minutes later, Wagner observed the same vehicle return and park in almost the same spot. Wagner told the jury that he observed the driver pull his t-shirt or something up over his nose a couple times and look directly into Wagner's home and the home south of Wagner's. N.T.1 56. Both individuals then got out of the car and walked south on Elmwood onto Harding and out of his sight. Wagner further testified:

> I turned on my scanner and I heard that the jewelry shop around the corner from me was robbed and I was about to call 911 when I observed the police car going down the street and I ran out and flagged him down.
>
> ...
>
> Approximately ten minutes, fifteen minutes after they were out of my sight, they came running back down Elmwood. Driver got in the car, had to wait a couple seconds for the passenger to catch up, and then he left.

N.T.1 58.

Wagner testified that Appellant Terrence Fowler was the individual who got back into the vehicle to drive the car and he knew that "because he looked right at me before he got out of the car the second time." N.T.1 59. Wagner further told the jury that when the occupants of the vehicle left the vehicle for ten minutes, *Wagner "ran out and wrote down the license plate number of the car."* N.T.1 59.

Wagner described Fowler as having worn all dark clothing and described him to police as 6'2" and 200 lbs. N.T.1 60. Further, *Wagner told the jury that the license plate of the vehicle was EZH 7965.* Wagner conceded that he did not observe the occupants of the vehicle carrying firearms although he stated that he did observe that both occupants were black men.

Although James Fowler, Appellant's father, testified that James was home at the time of the robbery, decisional law is clear that issues of credibility are to be left up to the factfinder and "the factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." **Commonwealth v. Ramtahal,** 33 A.3d 602, 609 (Pa. 2011). In reference to circumstantial evidence, even in a capital murder case, the Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence, and the jury, which passes upon the weight and credibility of each witness's testimony, is free to believe all, part, or none of the evidence. **Commonwealth v. Ramtahal,** 33 A.3d 602 (Pa. 2011).

The jury apparently found Wagner's testimony credible and failed to find any legitimate explanation as to why Wagner wrote down Fowler's license plate number if Fowler had not been one of the two men parked near his home located near the jewelry store shortly before the robbery. Frankly, the circumstantial evidence was insurmountable and the jury failed to hear any legitimate explanation that would explain why Fowler's vehicle was parked in Wagner's neighborhood if not for the commission of the robbery. Unfortunately for Fowler, and contrary to Fowler's assertion that his convictions were against the weight of the evidence, the weight of the evidence substantially supported the convictions and his claim is frivolous.[1]

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1 The 1925(b) Statement also contains an awkward claim that the trial court erred in failing to grant the judgment for acquittal. Discussion of this issue was omitted because the reasons provided mirror the rationale for the weight of the evidence claim and decisional law states, "A motion for a new trial based on a challenge to the weight of the evidence concedes the evidence was sufficient to support the verdict." **Commonwealth v. Davis**, 799 A.2d 860, 865 (Pa. Super. Ct. 2002).

Terrence Fowler argues that the sentence of 240 to 480 months for Attempted Homicide should have been modified because it reaches the statutory limit, the minimum sentence is indistinguishable from an aggravated range sentence, the court failed to consider various mitigating factors when fashioning the sentence, and the sentence for Attempted Homicide should have merged into the sentence for Aggravated Assault instead of the opposite.

Argument:

Fowler challenged his lengthy sentence of 20 to 40 years for the crime of Attempted Homicide. An appellate court's review of a sentence is limited by 42 Pa.C.S.A. § 9781:

...

> **(c) Determination on appeal.**--The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
>
> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

The notes of testimony reflect that before fashioning the sentence, Judge Connelly provided a lengthy explanation as to why the 20 to 40 year sentence for Attempted Homicide was appropriate.

Further, an allegation that a sentencing court failed to consider certain factors does not raise a substantial question. **Commonwealth v. Brown,** 741 A.2d 726, 735 (Pa. Super. Ct. 1999).

Fowler also complains on appeal that his sentence for Attempted Homicide should have merged into Aggravated Assault. In **Commonwealth v. Parham,** 969 A.2d 629 (Pa. Super. Ct. 2009), the Superior Court pointed out:

> Sentences are appropriate for merger when the same facts support convictions for more than one offense, the elements of the lesser offense are all included within the elements of the greater offense, and the greater offense includes at least one additional element. However, where both offenses require proof of at least one element that is different, the sentences do not merge.

In his post-sentence motion filed September 28, 2011, Fowler argued:

> At the time of sentencing, defense counsel argued to the Court that merger of the Aggravated Assault and Criminal Attempt at Homicide should occur. The defense also provided the Court with case law indicating that the Court had discretion to merge Criminal Attempt/Homicide into Aggravated Assault even though Aggravated Assault was the lesser included offense. E.G., ***Commonwealth v. Everett,*** 705 A.2d 837 (Pa. 1998). In the instant case, the factual circumstances would better justify a sentence for Aggravated Assault with a Criminal Attempt/Homicide being merged into that offense since there is not evidence beyond a reasonable doubt that the shooter actually intended to kill the victim at the time the victim was shot.

In **Everett,** the Pennsylvania Supreme Court explained:

> The terms "greater" and "lesser included" in the merger analysis refer to the logical relationship between elements of the offenses, not to the grading of the offenses or the punishments imposable. The offense that is more broadly defined is conceptualized as the greater offense and the offense whose elements are entirely subsumed is conceptualized as the lesser included offense. Where such a relationship exists, the merger doctrine requires that only one sentence may be imposed, but it has nothing to say about which sentence that should be.
>
> Superior Court has often stated that when crimes merge for sentencing purposes, the one for which a defendant may be sentenced is the one to which the legislature has attached the greatest penalty. Although in most cases the "greater" offense for merger analysis will also be the offense carrying the greater penalty, this is not universally true. In *Commonwealth v. Kozrad,* 346 Pa.Super. 470, 499 A.2d 1096 (1985), the court applied this rule in affirming a judgment of sentence for homicide by vehicle while driving under the influence, a third degree felony with a mandatory minimum sentence of three years, while vacating the separate sentence imposed for the first degree misdemeanor of involuntary manslaughter.

> The purpose of the merger doctrine is to determine whether the legislature intends that a single sentence should constitute all of the punishment for offenses that arise from the same criminal act or transaction. See *Anderson,* 538 Pa. at 577, 650 A.2d at 21. Indeed, in *Anderson* the doctrine was characterized as a rule of statutory construction designed for this purpose. *Id.*
>
> The legislature designated aggravated assault under 18 Pa.C.S. § 2702(a)(1) as a first degree felony, thus punishable by up to twenty years imprisonment. It would be absurd to use the merger doctrine to find, contrary to this explicit expression of intent, that the legislature intended that a lesser maximum sentence of ten years imprisonment should control where the circumstances also make out the crime of attempted murder.
>
> Because the common pleas court had discretion to sentence Everett on the aggravated assault charge rather than the attempted murder charge, the sentence of eight to twenty years imprisonment was neither illegal nor inconsistent with *Anderson.* Accordingly, the Superior Court's order reversing and remanding for resentencing is vacated and the judgment of sentence is reinstated.

Commonwealth v. Everett, 705 A.2d 837, 839 (Pa. 1998).

Santiago argument

I reviewed the record, the prior record score calculation, the reasonableness of Fowler's sentences and other potential issues. I have found no meritorious issues that I can raise on his behalf.

First, Fowler argues that his sentences failed to take into consideration various mitigating factors. Unfortunately, this claim is without merit to the extent that it is frivolous. Pennsylvania statutes provide the appellate courts guidance in reviewing a trial court's sentence:

> **(c) Determination on appeal.**--The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;

(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or

(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

(d) Review of record.--In reviewing the record the appellate court shall have regard for:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.

42 Pa.C.S.A. § 9781.

The Superior Court has held that an allegation that a sentencing court "failed to consider" or "did not adequately consider" certain factors does not raise a substantial question that the sentence was inappropriate. **Commonwealth v. Pettaccio**, 764 A.2d 582, 587 (Pa. Super. Ct. 2000). Such a challenge goes to the weight accorded the evidence and will not be considered by an appellate court absent extraordinary circumstances not present here.

Fowler also argues that the Court's merger of the sentence for Aggravated Assault into Attempted Homicide was not appropriate because the sentence for Attempted Homicide should have merged into the sentence for Aggravated Assault. My review of decisional law fails to support this assertion.

As stated above, the Superior Court held in **Commonwealth v. Parham,** 969 A.2d 629 (Pa. Super. Ct. 2009), that:

> Sentences are appropriate for merger when the same facts support convictions for more than one offense, the elements of the lesser offense are all included within the elements of the greater offense, and the greater offense includes at least one additional element. However, where both offenses require proof of at least one element that is different, the sentences do not merge.

Fowler argues that pursuant to **Commonwealth v. Everett,** 705 A.2d 837, 839 (Pa. 1998), Fowler's sentence of Attempted Homicide should have merged into the sentence for Aggravated Assault, thereby reducing by half the sentencing exposure. Unfortunately for Fowler, the Pennsylvania Supreme Court in Everett also pointed out, that the "[trial] court had discretion to impose sentence on any of the charges so long as it did not impose separate sentences for aggravated assault and attempted murder." **Everett,** 705 A.2d at 839.

A review of the record reveals that Judge Connelly was within his discretion to fashion Fowler's sentences, including the merger of the sentence for Aggravated Assault into that of Attempted Homicide. Further, the thoughtful statements made by the Court at sentencing, including a reference to the life-changing consequence for the victim, indicate that all necessary factors were considered. Fowler's arguments challenging the sentence are frivolous.

VIII. CONCLUSION

The case presents no non-frivolous issues for review.

Respectfully submitted,

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Date: February 24, 2012

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. 2536 OF 2010

vs. :

TERRANCE FOWLER, :

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CLERK OF COURTS
ERIE COUNTY
ERIE, PA 16501

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

AND NOW, this 6th day of December 2011, comes the apellant, by and through his attorney, and respectfully files this Statement, pursuant to Pa.R.A.P. 1925(b) and the Order of the Honorable Shad Connelly, Trial Court Judge.

I. PROCEDURAL AND FACTUAL HISTORY

1. Following a two-day trial, on July 15, 2011, a jury convicted appellant of all charges in the information: Criminal Attempt - Homicide (Serious Bodily Injury); Aggravated Assault; Criminal Conspiracy to Commit Aggravated Assault; Recklessly Endangering Another Person; Criminal Conspiracy to Commit Robbery, and Possessing Instruments of a Crime.[1]

2. On September 13, 2011, appellant's trial counsel, David G. Ridge, filed post-trial motions pursuant to Pa.R.Crim.P. 606 and 607, challenging the weight and sufficiency of the evidence adduced against appellant at trial.

3. On September 19, 2011, the Commonwealth filed its opposition to appellant's September 13, 2011, post-trial motion.

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4. On September 20, 2011, the Honorable Shad Connelly denied appellant's post-trial motions, and sentenced appellant as follows: Count 1 – Criminal Attempt - Homicide: 240

DEFENDANT'S EXHIBIT
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to 480 months; Count 2 – Aggravated Assault, merged with Count 1 for sentencing purposes; Count 5 – Robbery – 90 to 180 months, consecutive to the sentence imposed at Count 1; Count 4 – Criminal Conspiracy to Commit Robbery: 84 to 168 months to run concurrent to Count 5; Count 6 – Possessing instruments of a Crime: 10 to 20 months to be served concurrent to Count 4. The trial court also order appellant to pay restitution to the victim and to Assurant Health.

5. On September 29, 2011 appellant filed a Post-Sentence Motion: Motion for Modification of Sentence.

6. On October 6, 2011, the Commonwealth filed its opposition to appellant's September 29, 2011 motion to modify appellant's senctence.

7. On October 10, 2011, the Honorable Shad Connelly denied appellant's September 29, 2011 motion to modify appellant's sentence.

8. On October 13, 2011, the trial court granted appellant's retained attorney's motion to withdraw as counsel for appellant, and subsequently ordered the undersigned appointed to represent appellant. The Honorable Shad Connelly also ordered that appellant file his notice of appeal in a timely manner.

9. Appellant filed his notice of appeal within the time specified, and on November 15, 2011, the trial court ordered appellant to file his Concise Statement of Matters Complained of on Appeal, pursuant to Pa.R.A.P. 1925(b), within twenty-one days. This statement followed.[2]

II. MATTERS COMPLAINED OF ON APPEAL

1. Appellant contends that the jury's determination of guilt as to all charges is against the weight of the evidence, based on the following averments:

---

[1] At some point, not clear from the record in appellate counsel's possession, Count 3 was withdrawn.

[2] The Superior Court has docketed this case at 1787 WDA 2011.

A. The victim did not identify appellant as one of the individuals present at the scene of the crime at the time the victim suffered a gunshot wound;

B. A central Commonwealth eyewitness should not have been credited by the jury because the eyewitness's testimony at trial was fundamentally unreliable, in that, among other factors, the eyewitness misindentified a co-defendant in the case at appellant's preliminary hearing, that the eyewitness identification had been tainted because the eyewitness had seen appellant in a television news story, which showed appellant in handcuffs, being led out of a police station, and because the eyewitness had seen appellant at an earlier preliminary hearing – prior to the eyewitness's identification of appellant at appellant's preliminary hearing and at trial, in the presence of appellant's well-known trial counsel, Attorney Ridge.

C. The Commonwealth failed to adduce any evidence at trial that weapons and related items seized at appellant's residence had ever been fired or even handled by appellant;

D. The items of clothing used by the Commonwealth in its effort to identify appellant were common articles of clothing, such as T-shirts, a baseball cap, and the like, none of which was distinctive in nature;

E. The offenses occurred at approximately 11:40am, July 7, 2010; the defense produced a credible witness, James Fowler, who testified that appellant had been at their common residence for almost one hour before the police arrived at the residence at 12:15pm to 12:20pm on July 7, 2010, which would have made it impossible for appellant to have been at the scene of the offenses; the jury erred in failing to accept this testimony;

F. The appellant produced credible character evidence of appellant's non-violent nature, which should have been credited by the jury to the extent of creating a reasonable doubt as to appellant's guilt.

G. Further, appellant respectfully contends that the trial court erred in failing to grant appellant's procedurally-proper motion for judgment of acquittal, both orally and in writing, which motions were based, among other factors to be elaborated upon in appellant's opening brief:

i. The victim, who was able to recognize some character traits of one of the individuals who robbed him, did not provide any type of evidence or or testimony that he recognized or was able to identify the appellant as having been involved in the crimes;

ii. The eyewitness identification of appellant was unreliable and tainted, as set forth in section II(1)(B), above, and as will be elaborated upon in appellant's opening brief and other submissions to the Superior Court.

iii. As described above, the Commonwealth failed to adduce evidence that appellant had ever had any weapon in his possession that had actually been fired or even handled by appellant;

iv. Again, as described above, the articles of clothing identified by the victim as having been worn by one of his assailants were generic, indistinct, and are worn by a large percentage of the population and appellant's community; and

v. The Commonwealth produced no direct evidence of any kind that appellant shot the victim.

2. Appellant also respectfully contends that the trial court erred in denying appellant's motion to modify his sentence, filed on October 6, 2011, for the following reasons, to be elaborated or expanded upon in appellant's opening brief:

A. The trial court's sentence of 240 to 480 months, imposed at Count 1 of the Information, should have been modified and reduced because:

i. The sentence is a statutory limit for the conviction of a felony in the first degree;

ii. Although the trial court indicated at the time of sentencing that the sentence imposed is a standard range sentence, appellant respectfully contends that the 240 month minimum sentence is, as a practical matter and de facto, indistinguishable from an aggravated range sentence and can only be characterized, respectfully, as a standard range sentence within the strictest interpretation of the Pennsylvania Sentencing Guidelines;

iii. The imposition of a minimum sentence of 240 months as to Count 1 indicates, respectfully, that the trial court failed to consider and apply numerous factors in mitigation concerning appellant, including, among others, appellant's relationship with his child, family, church involvement, laudable employment history and his empathy for the victim, even as appellant continued to deny unequivocally that he had committed the offense for which he had been convicted;

iv. The trial court's sentence also fails to take into account that there exists only the most marginal of probabilities that appellant will become eligible for parole consideration at the expiration of his sentence at Count 1, resulting in an effective sentence of twenty years for that singular offense;

v. Appellant respectfully contends that the trial court should have reduced appellant's sentence to the lower end of the standard range of the Pennsylvania Sentencing Guidelines;

vi. Finally, Appellant also respectfully contends that as a matter of law and fact, the trial court abused its discretion in failing to merge Count 1 into Count 2 for sentencing purposes, rather than the obverse, as the trial court did in imposing the instant judgment of sentence.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA: No. 2536 of 2010

vs.

TERRANCE FOWLER,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is this date serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of the Pennsylvania Rules of Appellate Procedure:

Hon. John H. Daneri
Erie County District Attorney
Erie County Courthouse
Erie, PA 16501

Personal service upon duly authorized agent at office.

Honorable Shad Connelly
Erie County Courthouse
Erie, Pa.

Same.

Terrance Fowler
KF4317
SCI Camp Hill
PO Box 200
Camp Hill, PA 17001

First Class Mail

Respectfully submitted,

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Erie County Office of the Public Defender
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Date : December 6, 2011

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	OF ERIE COUNTY, PENNSYLVANIA
v.	:	CRIMINAL DIVISION
	:	
TERRANCE FOWLER	:	No. 2536 of 2010

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ERIE COUNTY

MEMORANDUM OPINION

Connelly, J., December 9, 2011

All of the Defendant's arguments in his Statement of Matters Complained of on Appeal go to the credibility and weight of the evidence and were addressed by trial counsel in his closing argument. Clearly the verdict was not against the weight of the credible evidence in that the jury found the Commonwealth's witness who identified the Defendant, his vehicle, and license plate number in close proximity to the crime scene before, during, and after. That, along with the descriptions of the assailant, the videotape of the robbers leaving the store, and the victim's description of his shooter constituted more than enough circumstantial evidence to implicate and convict the Defendant beyond a reasonable doubt. *See **Commonwealth v. Widmer***, 744 A.2d 745 (Pa. 2000).

As to the Defendant's sentence, it was in the standard range of the guidelines, the Court was informed by a Pre-Sentence Report, considered all of the information set forth by the defense as well as all other relevant factors and law. And other than setting forth a minimum and maximum sentence as required by law, the Court has no jurisdiction over if and when the Defendant will be eligible for release. That is entirely up to the Department of Corrections and the Board of Probation and Parole. Finally, the Court correctly merged the Aggravated Assault into the Criminal Attempt-Homicide as

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the Criminal Attempt carries the greater possible punishment, and the Aggravated Assault is the lesser-included offense in terms of the elements of each crime.

BY THE COURT:

Shad Connelly, Judge

John H. Daneri, Esquire
District Attorney's Office

Darrel J. Vandeveld, Esquire
Attorney for Defendant/Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

SITTING IN PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	1787 WDA 2011
	:	
TERRENCE FOWLER	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is this date serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of the Pennsylvania Rules of Appellate Procedure:

Bob Sambroak, Esq. Erie County District Attorney's Office Erie County Courthouse Erie, PA 16501	Personal service upon duly authorized agent at office.
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Respectfully submitted,

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Date: February 24, 2012